LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
NOV 18 1963
JOHN F. DAVIS, CLERK

No. 633

Supreme Court of the United States

OCTOBER TERM, 1963

MILLER & LUX INCORPORATED, *Petitioner*,

v.

R. H. ANDERSON, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DEAN ACHESON,
701 Union Trust Building,
Washington, D. C.

C. RAY ROBINSON,
550 Kearny Street,
San Francisco, California,

Attorneys for Petitioner.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
Rule Involved	3
Statement	4
Reasons for Granting the Writ	13
Conclusion	22
Appendix	1a

CITATIONS

Cases:

Ackerley v. *Commercial Credit Co.*, 111 F. Supp. 92 (D.N.J. 1953)	17
American Fid. & Cas. Co. v. *All American Bus Lines*, 190 F.2d 234 (10th Cir. 1951)	21
Austin v. *Massachusetts Bonding & Ins. Co.*, 56 Cal. 2d 596, 364 P.2d 681 (1961)	21
Bowles v. *Superior Court*, 44 Cal. 2d 574, 283 P.2d 704 (1955)	6, 7
Buckner v. *Foster*, 105 F. Supp. 279 (E.D. Mich. 1952)	17
California Auto Court Ass'n v. *Cohn*, 98 Cal. App. 2d 145, 219 P.2d 511 (2d Dist. 1950)	15
Carl Gutmann & Co. v. *Rohrer Knitting Mills*, 86 F. Supp. 506 (E.D. Pa. 1949)	16
Dawson v. *Schloss*, 93 Cal. 194, 29 Pac. 31 (1892)	14, 17
Ellis v. *Jewett Rhodes Motor Co.*, 29 Cal. App. 2d 395, 84 P.2d 791 (3d Dist. 1938)	15
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938)	18
Farrell v. *County of Placer*, 23 Cal. 2d 624, 145 P.2d 570 (1944)	14
Friend v. *Middle Atl. Transp. Co.*, 153 F.2d 778 (2d Cir. 1946)	17
Georgia v. *Pennsylvania R.R.*, 324 U.S. 439 (1945)	16
Greenwood v. *Mooradian*, 137 Cal. App. 2d 532, 290 P.2d 955 (2d Dist. 1955)	14
Hackner v. *Guaranty Trust Co.*, 117 F.2d 95 (2d Cir. 1941)	21
Hertz v. *Record Pub. Co.*, 219 F.2d 397 (3d Cir.), *cert. denied*, 349 U.S. 912 (1955)	18

Page

Holtz v. *United Plumbing & Heating Co.*, 49 Cal. 2d 501, 319 P.2d 617 (1957) 15
Jenkins v. *Westinghouse Elec. Co.*, 18 F.R.D. 267 (W.D. Mo. 1955) 18
Kincheloe v. *Retail Credit Co.*, 4 Cal. 2d 21, 46 P.2d 971 (1935) 15
Klopstock v. *Superior Court*, 17 Cal. 2d 13, 108 P.2d 906 (1941) 20
Lewis v. *Johnson*, 12 Cal. 2d 558, 86 P.2d 99 (1939) 15
Mackado v. *Katcher Meat Co.*, 108 Cal. App. 2d 1, 237 P.2d 715 (3d Dist. 1951) 15
Mox Inc. v. *Woods*, 202 Cal. 675, 262 Pac. 302 (1927) 14
Picking v. *Pennsylvania R.R.*, 152 F.2d 753 (3d Cir. 1945) .. 16
Valdez v. *Percy*, 35 Cal. 2d 338, 217 P.2d 422 (1950) 14
Ward v. *Deavers*, 203 F.2d 72 (D.C. Cir. 1953) 16
Weaver v. *Marcus*, 165 F.2d 862 (4th Cir. 1948) 16, 17
Wells v. *Universal Pictures Co.*, 166 F.2d 690 (2d Cir. 1948) .. 16
Wennerholm v. *Stanford Univ. School of Medicine*, 20 Cal. 2d 713, 128 P.2d 522 (1942) 21

Federal Rules of Civil Procedure:

Federal Rule of Civil Procedure 14 17
Federal Rule of Civil Procedure 19 3

Miscellaneous:

Moore, Federal Practice (2d ed. 1963) 17

Supreme Court of the United States

OCTOBER TERM, 1963

No.

MILLER & LUX INCORPORATED, *Petitioner,*

v.

R. H. ANDERSON, et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Miller & Lux Incorporated (hereafter "Miller & Lux"), prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on June 18, 1963. That judgment affirmed a judgment of the United States District Court for the Northern District of California dismissing petitioner's complaint as to all defendants on grounds which preclude any future recovery by or against any person on account of the wrongs charged in the complaint—wrongs which stand admitted in the present posture of the case.

OPINIONS BELOW

The opinion of the United States District Court for the Northern District of California (Carter, J.) denying respondents' motion to dismiss for failure to join indispensable parties (R. 368) is reported at 141 F. Supp. 41 (*sub nom. Miller & Lux, Inc.* v. *Nickel*) and appears in the Appendix hereto at page 1a. The opinion of the District Court for the Northern District of California (Wollenberg, J.) reversing Judge Carter's denial of respondents' motions to dismiss for failure to join indispensable parties, and dismissing the complaint on this ground and for failure to state a claim entitling petitioner to relief (R. 892), is unreported. It appears in the Appendix at page 10a. The opinion of the Court of Appeals (R. 1151) is reported at 318 F. 2d 831, and appears in the Appendix at page 15a, and the judgment of that Court (R. 1162) appears in the Appendix at page 26a. The order of the Court of Appeals denying petitioner's petition for rehearing (R. 1163) appears in the Appendix at page 27a.

JURISDICTION

The opinion and judgment of the Court of Appeals for the Ninth Circuit were filed on June 18, 1963. (R. 1161, 1162.) Petitioner's timely application for rehearing was denied by that Court on August 19, 1963. (R. 1163.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether in a suit against a number of joint wrongdoers for recovery of properties and for damages, the absence as parties defendant of certain of the wrongdoers requires that the complaint be dismissed without trial under Rule 19 of the Federal Rules of Civil Pro-

cedure for failure to join indispensable parties, merely because the court believes that those of the joint wrongdoers named as defendants may not be *in pari delicto* with those not named, when under the applicable substantive law (a) the named wrongdoers are jointly and severally liable to the plaintiff regardless of their relative degree of culpability as compared with wrongdoers not named; (b) the wrongdoers not named have made settlement and have been given covenants not to sue which do not release the wrongdoers named; and (c) dismissal of the complaint would forever foreclose recovery in any form against persons whose wrongs in the present posture of the case stand admitted.[1]

RULE INVOLVED

Rule 19 of the Federal Rules of Civil Procedure provides in pertinent part:

> "(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.
>
> "(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be

[1] If the Court should grant the writ of certiorari and set the case for argument rather than making the summary disposition which we suggest below, we intend also to urge that in holding that in any event petitioner was disabled from asserting its rights against the persons who had wronged it by virtue of the fact that certain of those wrongdoers had on its behalf impliedly "consented" to their own misconduct, the Court of Appeals erred in ignoring controlling California law and in attempting to fashion, without factual or legal foundation, a general rule of what it deemed to be equity.

parties if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the actions without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it; but the judgment rendered therein does not affect the rights or liabilities of absent persons."

STATEMENT

This case was instituted by petitioner in 1954. (R. 14.) In the nine years that have since elapsed petitioner has never been given an opportunity to prove the allegations of its complaint. Rather, in 1962, nearly eight years after the filing of the original complaint,[2] and after the occurrence of certain collateral developments providing the strongest indication of the substantive merit of at least some of the charges made, the third District Judge to be assigned to the case directed dismissal of the complaint on grounds essentially unrelated to the merits. (R. 892.) Since the applicable statute of limitations has long since run against the institution of a new action, if the dismissal is allowed to stand it will forever foreclose

---

[2] The original complaint has been twice amended with the permission of the court. Unless otherwise noted all references hereafter to the complaint are to the Second Amended Complaint, filed April 17, 1958. (R. 422.)

recovery, by anyone, on account of the grievous frauds and lengthy course of wrongdoing alleged in the complaint and will forever insulate all the defendants from any judicial inquiry into the serious charges made against them.

Petitioner Miller & Lux is a Nevada corporation. (R. 423.) It is in no sense a shell, but rather has at all pertinent times held substantial assets, largely in the form of land and securities. At all pertinent times petitioner's stock has been held in trust for the beneficiaries of the Henry Miller Trust, a California trust which was established in the early part of this century and which had three life tenants and some 28 individual contingent remaindermen when this suit was filed. (R. 425.)

Early in 1954 certain of the beneficiaries of the Henry Miller Trust became aware of facts strongly indicating that there had long existed an unlawful scheme on the part of various of the trustees of the Trust, all of whom were directors of petitioner, certain other directors, and certain officers, employees and agents of petitioner and a number of outsiders. That scheme had been one to loot petitioner by depriving it of many of its valuable assets for a wholly inadequate consideration, by sales to and through dummy purchasers and other forms of fraudulent self-dealing and manipulation. On the basis of this information, a suit was promptly instituted in the state courts of California, seeking the ouster of the then trustees of the Henry Miller Trust. (R. 456.) That suit was a preliminary step in ridding petitioner of the domination of the persons who, it appeared, had long acted in a way wholly inimical to the interests of petitioner and its beneficial stockholders.

Two of the three trustees promptly resigned and the third was removed by order of the California court. (R. 456; see *Bowles* v. *Superior Court*, 44 Cal. 2d 574, 283 P. 2d 704 (1955).) The new and independent trustees appointed by the Court promptly made changes in petitioner's Board of Directors. The new Board of Directors immediately instituted an investigation, and promptly caused this action to be instituted by petitioner in the United States District Court for the Northern District of California, involving the jurisdiction of that court under the provisions of 28 U.S.C. § 1332(a)(1). (R. 457-458.)

As originally filed and subsequently amended, the complaint alleged, in essence, a vast scheme, implemented over a period of more than two decades, whereby various of petitioner's former directors, officers and agents had acted wrongfully to enrich themselves and their confederates by disposing of various of petitioner's assets—principally land with actual or potential value for oil development—to themselves and their confederates at wholly inadequate prices. (R. 428-449.) Named as defendants were these directors, officers and agents (or in the case of those deceased, their estates), and the confederates above referred to. Also named were certain other persons who had taken conveyances of particular interests in lands wrongfully secured from petitioner with notice or knowledge that as to those conveyances they were participating in the implementation of a wrongful plan. All the defendants except the group last described were charged as joint tortfeasors with respect to all the transactions alleged in the complaint, and each of the group last described was charged as

a joint tortfeasor with the entire first group of defendants with respect to the particular transactions in which he participated. The complaint sought the return of the lands and properties wrongfully taken and, to the extent that interests in those lands and properties had been subsequently retransferred to innocent third parties, money damages from the wrongdoer transferors, all in a total sum of 110 million dollars. (R. 458-460.)

It soon became apparent that the allegations of the complaint were not without substance. Shortly after the complaint was filed, a settlement was entered into between petitioner and the estate of one of the defendants, a faithless former agent named Houchin, whereby petitioner received from that estate more than two million dollars in cash, and property with an additional value of several million dollars. See *Bowles* v. *Superior Court*, 44 Cal. 2d 574, 581, 283 P. 2d 704, 709 (1955). In consideration of this settlement, petitioner dismissed the Houchin Estate and its executors as defendants to the complaint (R. 360) and executed a covenant not to sue as to them. Because, as above recited, the total injury suffered by petitioner was many times the several million dollars thus received by it, and because Houchin was only one of the many persons charged with wrongdoing, petitioner continued to proceed, as was its right, with its action against the remaining defendants.

During the months which followed, three additional defendants, J. Leroy Nickel, Jr., J. E. Woolley and A. R. Olsen, made settlement with petitioner, were given covenants not to sue, and were dismissed from the action. (R. 50, 64, 234.) Because J. Leroy Nickel,

Jr., was at the time of the settlement himself one of the life-tenant beneficiaries of the Henry Miller Trust, although without any remainder interest therein, petitioner required him in the instrument of settlement specifically and completely to disclaim all rights to any principal amount recovered in this litigation or to any income attributable thereto. (R. vol. 4, pp. 86-91.) These settlements, like that with the Houchin Estate, resulted in some recovery to petitioner, but in an amount equal to only a small fraction of the total damages claimed in the complaint.

The remaining defendants attacked the complaint with a broad array of motions. (See R. 201-222, 238-359, 363-367.) Among these were motions for dismissal on the ground that the beneficiaries of the Henry Miller Trust were indispensable parties who could not be joined as such without destroying the jurisdiction of the Court. The essential theory of the motions was that because J. Leroy Nickel, Jr., was both a life beneficiary in the Trust that held petitioner's stock and one of those charged with wrongs against the corporation, any recovery by petitioner should be reduced by an amount equal to that by which Nickel might potentially benefit, directly or indirectly, as a result of that recovery, and that the only way that this could be accomplished was by joining the beneficiaries other than Nickel as the "true" plaintiffs. (See R. 282-283.)

On May 15, 1956, the District Court (Carter, J.) denied the motions, holding that it was apparent that petitioner had a bona fide corporate entity and was not the mere alter ego of its beneficial stockholders, and that under these circumstances the fact that Leroy Nickel might have an indirect interest in a corporate

recovery was an insufficient reason to ignore petitioner's existence and require the beneficiaries or the trustees of the Henry Miller Trust to be joined as parties. (R. 368.)[3]

During the succeeding years plaintiff proceeded with discovery and other investigative measures.[4] Although its efforts were partially frustrated by the suicide of J. Leroy Nickel, Jr., in 1959, on the eve of the taking of his deposition (R. 778-780, 789), that discovery and investigation nevertheless produced abundant additional evidence supporting the charges of petitioner's complaint.

In March 1962, some six years after Judge Carter's ruling and well after the running of the applicable statute of limitations against the institution of a new action, but before petitioner had been permitted to go to trial on the allegations of its complaint, another Judge of the District Court (Wollenberg, J.) reversed Judge Carter's ruling, holding that for the very reasons previously considered and rejected, the trustees and beneficiaries of the Henry Miller Trust were in fact indispensable parties, whose joinder would destroy the court's jurisdiction. (R. 892.) In the same opinion, Judge Wollenberg went on to hold that in any event the complaint failed to state a claim upon which

---

[3] In fact, as noted above, J. Leroy Nickel, Jr., could not have had any interest, direct or indirect, in any recovery by petitioner since he had expressly waived any right to participate in any way in such recovery.

[4] During this period petitioner answered 42 sets of interrogatories propounded by respondents containing in excess of 2,800 individual questions; and respondents answered 39 sets of interrogatories containing more than 2,350 individual questions. Over 1,500 pages of depositions were taken of 27 different persons and approximately 50 days of proceedings were had in the District Court.

relief could be granted because it disclosed that among the persons identified therein as wrongdoers were three who for some years prior to the filing of the complaint had served as trustees of the Henry Miller Trust and in that capacity had collectively held legal title to petitioner's stock. The Court reasoned that as wrongdoers these defendants must have "consented" to their own wrongs, and that this fact brought into play a rule that a corporation cannot sue third parties on account of transactions to which all its shareholders have consented.

Petitioner appealed the dismissal of its complaint, urging that the District Court had erred both in finding that the trustees and beneficiaries of the Henry Miller Trust were indispensable parties and in holding that an implied "consent" to their own misconduct of persons holding the bare legal title to petitioner's stock foreclosed petitioner from thereafter proceeding against those persons and their confederates and transferees with notice. (R. 907, 1146.) In an opinion altogether barren of any citation of relevant authority, the Court of Appeals affirmed the District Court's judgment.

The Court of Appeals held, as the District Court had held, that petitioner, as a corporation whose stock was held by a trust, had no right to sue anyone on account of actions in which persons who were trustees or who later became trustees of that trust were claimed to have participated. (See R. 1159-1161.) Without any reference to California law, the court supported its holding by invoking what it appeared to believe to be general principles of equity. The court reasoned that it would be unfair to permit a corporation to sue

a third party who had dealt with it on a basis which, although plainly improvident from the corporation's standpoint, had been approved by persons whom the third party believed to hold the entire legal and equitable interest in that corporation. The court made no effort to relate this concern to the present case, where no defendant has made any attempt to show that in its dealings with petitioner's faithless officers, employees and agents it reasonably relied on a belief that petitioner's true owners had authorized or approved those dealings.

On the issue of indispensable parties the court's primary concern was not, like that of the District Court, the absence of the trustees and beneficiaries of the Henry Miller Trust. Rather, the court held that the litigation could or should not proceed in the absence of four persons, whom it characterized as "primary wrongdoers," who were described in the complaint as important actors in the scheme of fraud there delineated but who were not named as defendants. (R. 1156-1157.) Three of the four persons named by the court, J. Leroy Nickel, Jr., Woolley and Olsen, had, as above stated, been named as defendants in the original complaint but had thereafter made settlement with petitioner and been dismissed. The fourth, one Fickett, had died prior to the filing of the Second Amended Complaint and accordingly was not himself named as a defendant, although contrary to the court's apparent understanding, his estate and its executors were so named. (See R. 422, 450-451.)

The court recognized that the defendants named in the complaint were charged as joint wrongdoers with those who had been dismissed (see R. 1153), and did not suggest that the facts stated in the complaint failed

to show liability on the part of the named defendants. Nevertheless, the court held that the four persons named above were indispensable parties defendant because the court was unwilling to assume "that the defendants included in the second amended complaint are *in pari delicto* with the primary wrongdoers named but not made defendants in the complaint" (R. 1156), and because it believed that it might well be unfair to require the named defendants "to bear alone the entire responsibility for the wrong." (*Ibid.*) The court thus ruled that in a suit in a federal court against joint wrongdoers, all those characterized in the complaint as important participants in the joint wrong are indispensable parties, and hence that the execution by plaintiff of a covenant not to sue any such important participant is in and of itself fatal to the jurisdiction of the federal court over a suit against other of the joint wrongdoers.[5]

The court's opinion ended with a peroration as to the desirability of a suit in which the beneficiaries of the Henry Miller Trust would come forward to "speak for themselves," prophesying that "when they do speak," a litigation more generally satisfactory than the present one can take place. (R. 1160-1161.) The court appeared to be unaware of, or to ignore, the fact that if its decision stands neither the beneficiaries nor anyone else will be in a position to speak as to the wrongs detailed in the complaint, because of the

[5] The court also seemed to be of the view that because J. Leroy Nickel, Jr., was both a beneficiary of the Henry Miller Trust and an alleged wrongdoer, all the other beneficiaries of the Trust were indispensable parties plaintiff because absent their joinder no assurance could be had that Nickel would not share in any recovery by petitioner. (R. 1158, 1160.) It did not, however, appear to rest its decision in whole or in part on this latter ground. As we have shown above (p. 8), the court's suggestion rests on a misapprehension of fact.

running of the statute of limitations against the institution of a new suit during the nine-year period that elapsed between the filing of the original complaint and the entry of the judgment below.

REASONS FOR GRANTING THE WRIT

This is the rare case in which certiorari should be granted because a Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as plainly to call for the corrective exercise of this Court's power of supervision. It is, moreover, the rare case in which it is appropriate that this power be exercised summarily, without the necessity for additional briefs or for oral argument. The ruling of the court below that the complaint must be dismissed because four of the many persons described therein as wrongdoers have been voluntarily dismissed by petitioner as defendants is contrary to the decisions of other Courts of Appeals, rests upon demonstrably untenable foundations, and if permitted to stand will have grossly unjust consequences. Although not in terms so denominated, the ruling necessarily is that these persons were in the court's view indispensable parties defendant to this litigation within the meaning of Rule 19 of the Federal Rules of Civil Procedure. That ruling so far distorts as to render unrecognizable the concept of indispensable parties as embodied in Rule 19, and unless promptly corrected will be a fertile source of future confusion in the application of that rule.

It may be suggested that because the decision of the court below rests also upon another ground, *i.e.*, that the cause of action sought to be asserted here is in reality not petitioner's but that of the present trustees or beneficiaries of the Henry Miller Trust,

correction of that court's egregious misapplication of the indispensable parties rule would have only academic consequences. We believe that this ruling too is demonstrably erroneous, and that the court below either ignored or flagrantly misapplied California law in reaching it. We do not, however, tender it as an independent ground supporting the exercise of this Court's certiorari jurisdiction, or the relief which petitioner here seeks. Nevertheless, as we shall show, a reversal of the decision below insofar as it rests on the issue of indispensable parties, and a vacating of the Court of Appeals' judgment, will have direct legal consequences in this litigation that are far from academic even without a correction by this Court of the other erroneous ruling referred to. For that action will open, with respect to the conduct detailed in petitioner's complaint, avenues to at least partial relief which are inexorably closed so long as the Court of Appeals' present judgment is permitted to stand.

A.

Because this is a diversity case, the substantive rights of the parties are governed by state law—here by the law of California. Under that law, as under the law of all the other states, joint tortfeasors are liable to those injured by their tort both jointly and severally. *E.g., Valdez* v. *Percy*, 35 Cal. 2d 338, 217 P.2d 422 (1950); *Farrell* v. *County of Placer*, 23 Cal. 2d 624, 145 P.2d 570 (1944); *Dawson* v. *Schloss*, 93 Cal. 194, 29 Pac. 31 (1892). This is so irrespective of whether they are *in pari delicto* with one another, for that fact is relevant, if at all, only to a determination of their ultimate liability as among themselves. *Mox Inc.* v. *Woods*, 202 Cal. 675, 262 Pac. 302 (1927); *Greenwood* v. *Mooradian*, 137 Cal. App. 2d 532, 290 P.2d 955 (2d

Dist. 1955); *Machado* v. *Katcher Meat Co.*, 108 Cal. App. 2d 1, 237 P.2d 715 (3d Dist. 1951); *California Auto Court Ass'n* v. *Cohn*, 98 Cal. App. 2d 145, 219 P.2d 511 (2d Dist. 1950). The court below pointed to no exception to that rule under the law of California, and none in fact exists. Under California law it is equally clear that the execution by a plaintiff of a covenant not to sue one joint tortfeasor in no way affects or limits the plaintiff's right to proceed against other joint tortfeasors, although his potential recovery against the latter is of course diminished by the amount received in consideration of the covenant. *Lewis* v. *Johnson*, 12 Cal. 2d 558, 86 P.2d 99 (1939); *Kincheloe* v. *Retail Credit Co.*, 4 Cal. 2d 21, 46 P.2d 971 (1935); *Ellis* v. *Jewett Rhodes Motor Co.*, 29 Cal. App. 2d 395, 84 P.2d 791 (3d Dist. 1938). Indeed, this principle is so well settled that it is applied not only where the remaining defendant is not *in pari delicto*, but even where the covenantee is, as among the tortfeasors, ultimately soley liable. *Holtz* v. *United Plumbing & Heating Co.*, 49 Cal. 2d 501, 319 P.2d 617 (1957).

Given these applicable rules of substantive law, the decision of the Court of Appeals that the persons whom it characterized as "primary wrongdoers" are indispensable parties must rest on one or the other of two possible grounds. The court may have proceeded on the theory that, even though under California law the culpability of tortfeasors not charged as defendants does not diminish the liability to the plaintiff of those who are charged, nevertheless, if under that law it might be appropriate to exact a contribution by the "primary" wrongdoers to any recovery had from the "secondary" wrongdoers, then the federal standard of Rule 19 of the Federal Rules of Civil Procedure re-

quires that the "primary" wrongdoer be joined in a suit against the "secondary" one.[6] Alternatively (and the court's failure to make any reference to California law tends to suggest the likelihood of this explanation) the theory may have been that irrespective of obligations which state law imposes on the perpetrators of a joint wrong to the victim thereof, a federal court sitting in diversity may, if it deems the consequences of application of that law to be "inequitable," ignore that law and instead allocate liability on any basis which it deems to be "just."

To the extent that the decision of the Court of Appeals as to the indispensability of Nickel, Woolley, Olsen and Fickett rests on the proposition that the wrongdoers named in the complaint are not *in pari delicto* with them, although jointly liable with them so far as the persons injured by the joint tort is concerned, it is squarely contrary to the decisions of other Courts of Appeals that persons jointly and severally liable to the plaintiff under relevant state law may be proceeded against separately in a diversity action in the federal courts, so long as the relief sought will not adversely affect the interests of the absent party. See, *e.g.*, *Ward* v. *Deavers*, 203 F.2d 72 (D.C. Cir. 1953); *Wells* v. *Universal Pictures Co.*, 166 F.2d 690 (2d Cir. 1948); *Weaver* v. *Marcus*, 165 F.2d 862 (4th Cir. 1948); *Picking* v. *Pennsylvania R.R.*, 152 F.2d 753 (3d Cir. 1945); *cf. Georgia* v. *Pennsylvania R.R.*, 324 U.S. 439 (1945); see also *Carl Gutmann & Co.* v. *Rohrer Knitting Mills*, 86 F. Supp. 506 (E.D. Pa.

[6] We here use the characterizations "primary" and "secondary" in light of the court's use of the former term. In fact, of course, so far as the rights of a plaintiff injured by a joint wrong is concerned the law knows no distinction between the "primary" and "secondary" actors in that wrong.

1949); *Ackerley* v. *Commercial Credit Co.*, 111 F. Supp. 92 (D.N.J. 1953).[7]

The decision is, moreover, plainly erroneous. Even if it were to be assumed that under California law a "secondary" wrongdoer has some right of contribution as against a "primary" one if a plaintiff has succeeded in collecting from him what under the circumstances appears to be a disproportionate share of the damages occasioned by the joint tort, that fact would in no way support a holding that the plaintiff must make the primary wrongdoer a defendant in any suit against the secondary one or suffer dismissal. In this situation the defendant might perhaps be able to make the primary wrongdoer a third-party defendant, if he chose to do so. Indeed, it is for precisely situations such as this that the liberal third-party practice of Rule 14 of the Federal Rules of Civil Procedure is designed. But under that Rule it is clear that a plaintiff can *not* be required to join such a person as a defendant if he does not choose to do so. See *Weaver* v. *Marcus*, 165 F.2d 862, 866 (4th Cir. 1948); *Friend* v. *Middle Atl. Transp. Co.*, 153 F.2d 778 (2d Cir. 1946); *Buckner* v. *Foster*, 105 F. Supp. 279 (E.D. Mich. 1952); 3 Moore, *Federal Practice* ¶¶14.01 [1]–[3], 14.15 (2d ed. 1963). The decision below is in square and irreconcilable conflict with the cited cases and with the policy of, and practice under, Rule 14.[8]

---

[7] The law of California has long been to the same effect. Dawson v. Schloss, 93 Cal. 194, 29 Pac. 31 (1892).

[8] Petitioner does not claim that every named defendant is responsible for the entire tortious course of conduct set forth in its complaint. As pointed out above in the Statement of the Case, a number of defendants are charged with liability only as to the transactions in which they personally participated. As to these transactions, however, they are joint tortfeasors and liable to a degree equal to the other tortfeasors, named and unnamed.

If in fact the holding below is based on its only other possible rationale, it is no less plainly erroneous and creates a conflict of decision no less irreconcilable. For to reach its remarkable result by this course the court must needs have determined that *irrespective* of the substantive liabilities imposed by California law on persons in the position of the present defendants, it was free to make an independent judgment, under some unarticulated standard of its own invention, as to the "fairness" of the imposition of such liabilities, and to apply the indispensable party test of Rule 19 of the Federal Rules of Civil Procedure only after reallocating to its own satisfaction these liabilities as between those defendants and other persons. Such a holding cannot of course stand under the fundamental rule of decision which controls the federal courts in diversity cases—that on matters of substance the federal courts are not free to apply their own concepts of justice but are compelled to follow the law as it is applied by the courts of the state in which they sit. *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938). Such a holding in addition specifically conflicts with the decisions in other circuits holding that in passing on the federal question of indispensability under Rule 19 in a diversity case, the court will take the substantive interests of the parties as it finds them under state law. See, *e.g.*, *Hertz* v. *Record Pub. Co.*, 219 F.2d 397 (3d Cir.), *cert. denied*, 349 U.S. 912 (1955); *Jenkins* v. *Westinghouse Elec. Co.*, 18 F.R.D. 267 (W.D. Mo. 1955). It should be overturned forthwith.

It may finally be noted that, even if under the law of California a "secondary" wrongdoer is liable to a plaintiff for less than all of the injury caused him by the wrong, there would still be no basis for holding on

that account that the "primary" wrongdoer is an indispensable party in an action brought against the secondary wrongdoer. Under these circumstances the rights of the secondary wrongdoer would be fully served by permitting him to introduce evidence of, and plead in mitigation, the primary wrongdoing of others, steps which he would be equally free to take irrespective of whether the primary wrongdoers were also named as defendants. If this were the law the plaintiff would, of course, suffer by reason of his failure to join the primary wrongdoer, for his recovery against the secondary wrongdoer would leave him less than whole, but that is plainly something of which the wrongdoers would be in no position to complain.[9]

B.

As indicated above, petitioner recognizes that the decision below purported to rest not only on the ground of absence of indispensable parties, but also on the ground that petitioner had no right to enforce the causes of action set forth in the complaint because those causes of action in fact belonged to the trustees or beneficiaries of the Henry Miller Trust. Petitioner recognizes also that when a judgment rests on truly alternative and independent grounds there is no basis for vacating it merely because one of those grounds has been shown to be wholly insupportable, since the same

[9] It is unnecessary to discuss the court's suggestion that the persons to whom petitioner had given covenants not to sue were indispensable defendants because their presence was essential in order to ascertain the degree to which settlements made by them had already compensated petitioner. This is of course a matter to be dealt with by way of evidence, and does not require the presence of the persons referred to as defendants. Indeed, the court does not trouble to explain how persons given covenants not to sue *could* be named as defendants.

result would nevertheless be dictated by the other ground of decision taken alone. In the instant case, however, a determination by this Court that the court below erred on the issue of indispensable parties would fully justify, and indeed would require, a vacating of the judgment below, for the following reasons:

As pointed out above, neither the trustees nor the beneficiaries of the Henry Miller Trust could now institute a new suit, against anyone, on account of the transactions complained of in the instant case, since the applicable statute of limitations ran as to any such new suit during the nine years that elapsed between the filing of petitioner's complaint and the judgment of the court below. Even if it were to be assumed, however, that the ruling below that petitioner was not the proper party to bring this suit was correct, a decision based on that ground alone would not preclude, as the judgment of the Court of Appeals at present precludes, the further maintenance of this litigation. Rather, it has been held by both the California and federal courts in circumstances strikingly similar to those here presented that if it is determined, after the running of the limitations period against a new action, that the party who has brought suit in the first instance is not the proper plaintiff, the correct course is to permit amendment of the complaint to substitute one or more proper plaintiffs for the plaintiff found to be improper and, so long as recovery is sought "upon the same general set of facts," to relate the complaint of the substituted plaintiffs back to the date of original filing so as to avoid the bar of limitations.[19]

[19] See, for example, Klopstock v. Superior Court, 17 Cal. 2d 13, 108 P.2d 906 (1941). There a derivative suit had been instituted by a representative of the legatee of a deceased stockholder, and the California Supreme Court held that because the representative

Accordingly, had the decision below been solely that it was the trustees or beneficiaries of the Henry Miller Trust who were the real parties in interest with respect to the facts alleged in petitioner's complaint—and hence should be the parties plaintiff—the effect of that decision would not have been forever to foreclose the rights of those trustees and beneficiaries, but rather simply to require the substitution of the trustees or beneficiaries as plaintiffs in petitioner's stead.[11] So long as the court's ruling on the issue of

---

was not a proper plaintiff, a demurrer to the complaint should have been sustained on grounds of no cause of action. The Court nevertheless went on to hold that it was altogether proper to permit an amendment of the complaint which in effect substituted a proper plaintiff for the one found improper. See also Wennerholm v. Stanford Univ. School of Medicine, 20 Cal. 2d 713, 128 P.2d 522 (1942); Austin v. Massachusetts Bonding & Ins. Co., 56 Cal. 2d 596, 364 P.2d 681 (1961); Hackner v. Guaranty Trust Co., 117 F.2d 95 (2d Cir. 1941); American Fid. & Cas. Co. v. All American Bus Lines, 190 F.2d 234 (10th Cir. 1951).

[11] Because of the large number of beneficiaries involved, in all likelihood the complaint would under these circumstances be amended to name the present trustees of the Henry Miller Trust rather than the beneficiaries as plaintiffs. The suggestion of the Court of Appeals that it might be necessary to have the beneficiaries as parties plaintiff rests on a basic misapprehension of fact. The sole reason advanced for the suggestion was that because the former life interest beneficiary J. Leroy Nickel, Jr., is claimed in the complaint to have been a wrongdoer, it might be necessary for the court so to mold an eventual decree as to prevent his estate from having any interest in any recovery allowed. As explained above, however, J. Leroy Nickel, Jr., long ago formally disclaimed any interest in such recovery. Accordingly, although defendants will be free to urge on trial that any recovery awarded the trustees should be diminished in an amount equal to the interest that Nickel's estate would have had in that recovery absent the disclaimer, the Court will be able to accept or reject that argument as it sees fit without the presence of Nickel's estate without in any way prejudicing the interests of that estate.

indispensable parties stands, however, such a course is foreclosed, because if the California citizens found by that court to be indispensable as defendants are in fact indispensable neither the trustees nor the beneficiaries of the Henry Miller Trust, also California citizens, could be substituted as plaintiffs without destroying diversity and thus depriving the court of jurisdiction. Accordingly, only if that ruling is reversed, and the judgment of dismissal vacated, will it be possible for the first time for the trustees or beneficiaries to invoke the right of substitution and thus preserve their rights against the bar of limitations.

CONCLUSION

For the foregoing reasons petitioner prays that this petition for certiorari be granted, and that the judgment below be summarily vacated and the case remanded to the Court of Appeals with directions to remand the case to the District Court for consideration of a motion for amendment of the complaint by way of substitution of parties plaintiff. Alternatively, petitioner prays that the writ of certiorari be granted.

Respectfully submitted,

DEAN ACHESON,
701 Union Trust Building,
Washington, D. C.

C. RAY ROBINSON,
550 Kearny Street,
San Francisco, California,

Attorneys for Petitioner.

November 18, 1963